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No. _____

In The Supreme Court Of The United States

October Term 1995

Jewell Kissinger and Gladys Kissinger — Petitioners

v.

Arkansas State Highway Commission — Respondent

PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF EIGHTH CIRCUIT COURT OF APPEALS

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QUESTION FOR REVIEW

Whether petitioners should be denied the right to due process against the Arkansas State Highway Commission when their land has been taken without compensation.

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No._____

In The Supreme Court Of The United States

Jewell Kissinger and Gladys Kissinger *Petitioners*

v.

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PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF ARKANSAS COURT OF APPEALS

OPINIONS BELOW

The Order of the Craighead County Circuit Court is attached as Appendix A-1. The opinion of the Arkansas State Claims Commission dated August 10, 1993 appears as Appendix B-1 hereto. The U. S. District Court for the Eastern District of Arkansas granted a Motion to Dismiss on August 23, 1994, with a copy of the order appearing as Appendix C-1. The Order of the Eighth Circuit U. S. Court of Appeals filed February 28, 1995 appears herein as Appendix D-1.

STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the U. S. District Court for the Eastern District of Arkansas for which review is sought was delivered on August 23, 1994. Appeal was duly taken to the Eighth Circuit Court of Appeals per Notice of Appeal of September 7, 1994. The Eighth Circuit Court of Appeals affirmed the District Court by Order filed February 28, 1995. The Petition is filed within 90 days of such order affirming the decision of the District Court.

Rule 10 of the rules of the Supreme Court confer jurisdiction upon the Court to review the decision of the 42-Eighth Circuit Court of Appeals, in that it decided an important federal question contrary to the decisions of this Court and the U. S. Constitution and rendering constitutional provisions meaningless in the State of Arkansas in instances such as this one.

QUESTION FOR REVIEW

Whether petitioners should be denied the right to due process against the Arkansas State Highway Commission when their land has been taken without compensation.

STATEMENT OF FACTS

In the latter part of 1987 and the early part of 1988, the defendant, Arkansas State Highway Commission, came upon a portion of the property owned by the plaintiffs and bulldozed trees and shrubs and tore out the driveways and entry into the plaintiffs' home and adjacent rental house. Road access was denied to the property by the highway commission. In the same action, plaintiffs' fences were damaged or destroyed, along with a portion of their yards. No prior notice was given and no eminent domain action was ever initiated by the defendant, nor was any need established for the taking for public use or purpose of the property. The condemnation of the land was obviously not according to law. The plaintiffs filed suit in their local Circuit Court seeking damages for constitutional due process violations, as well as damages to property not taken and for the taking of a portion of the property. Subsequently, the Craighead County Circuit Court refused to hear the case, citing governmental immunity, and plaintiffs thereupon filed a claim with the Arkansas State Claims Commission on October 18, 1991. The Claims Commission ultimately rendered a decision in the claim only on the issue of damage to the plaintiffs' property in the sum of $13,000.00. The Arkansas Claims Commission refused to address the issue of the taking of the property and the issues of damages for the constitutional violations and due process damage allegations. The plaintiffs were prepared to present evidence at the hearing that a portion of their property had been taken and their constitutional rights violated, but the Arkansas Claims Commission refused to hear those issues. Thereby, the plaintiffs were denied any hearing with regard to the taking of their property or their issues of denial of their constitutional rights. They then filed an action in the Federal District Court for the Eastern District of Arkansas, to seek redress for the actions. The defense filed its Motion to Dismiss, and after review of the motion and the response and briefs of the parties, the Federal District Court entered its order granting the Motion to Dismiss. The 8th Circuit Court of Appeals endorsed the District Court Judge's ruling in a summary decision, and this appeal follows.

BRIEF AND ARGUMENT

The plaintiff's appeal in this matter is based upon the erroneous ruing of the Court dismissing plaintiffs' complaint. The defendant filed its F.R.C.P. Rule 12(b)6 motion along with the assertion that the suit was barred by the 11th Amendment to the U. S. Constitution and other bases. The Federal District Court granted the motion based upon its determination that the suit was barred by the 11th Amendment to the U. S. Constitution.

In this circumstance, the appellants tried to follow through with the actions provided by the Circuit Court and the Arkansas State Claims Commission, but were denied due process and the opportunity to air their complaint. The Claims Commission refused to consider the issues of due process and the issue of the actual taking of property by the defendant. The State of Arkansas originally set up the Claims Commission so that such claims could be heard and dealt with, but due process was denied to these plaintiffs both at the Circuit Court level and at the Claims Commission level. Neither accorded the plaintiffs consideration or the actual loss of their property or gave them due process as to the taking of their property or their *damages* or rights arising therefrom. Yes, they did receive an award for damages to the property they retained, but the system set up by the State refused to act or to give them any other consideration. Thereby, they were denied due process, and the Arkansas Highway Commission was allowed to take their property without due process or compensation. Thus, they have been denied their rights pursuant to Amendment 14 of the U. S. Constitution which precludes any State from depriving a person of life, liberty or property without due process of law. Further, Amendments 5 and 8 to the U. S. Constitution and Article 2, §§21 and 22 of the Arkansas Constitution provide additional support for the proposition of denial of appellants' constitutional rights. The appellants here pursued the options provided by the State, which, if they had worked, might have satisfied the due process requirements and arguments herein. However, they did not, and the facts remain that these plaintiffs have had no opportunity to present their case nor be heard with regard to the taking of their property nor the denial of their due process issues.

The Highway Commissioners knew or should have known that

this was a taking of property without any due process. Such a taking is not one in good faith. The Highway commission did not follow the appropriate action pursuant to their right of eminent domain as set out in the State statutory proviso. (A.C.A. 27-67-301 et. fol.) In ***Harris v. Missouri Conservation Commission,*** 790 F2d 678; and in 472 F. App. 333 (E.D. Ark. 1974), the procedures had not been followed as provided for by the State to rectify wrongs and to provide compensation. Therefore, no lack of due process was found. In the present instance, those procedures have been followed, but the procedures have not proven to provide due process to these appellants. Therefore, this Court is the appropriate forum under 42 U.S.C. §1983 for redress for violation of rights. State officials who violate a party's federal, constitutional, or statutory rights may be made to respond in damages within the Federal Court system. *City of Greenwood, Mississippi v. Peacock,* 384 U. S. 808 (1966).

As has previously been held, where a governmental agency takes the property of a person and then constitutes itself a Judge in the same case to determine the just compensation, this offends the most fundamental principles of natural justice and constitutional law. The determination of what is a proper compensation must be determined through a judicial function. See *Florida Power Corp. v. F.C.C.,* 772 F. 2d 1537, rehearing denied 778 F. 2d 793, probable jurisdiction noted 106 S. Ct. 2273, 476 U. S. 1156, 90 L. Ed. 2d 716, reversed 107 S. Ct. 1107, 480 U.S. 245, 94 L. Ed. 2d 282. In Arkansas, at best, there is a quasi-judicial body called the State Claims Commission. The only potential appeal provided for, would be to the Arkansas Legislature. That is obviously not a judicial body under any sense of the word, and is not appropriate bases nor forum for adjudication of damages. In the present instance, the Arkansas Claims Commission failed to act in the appropriate method and bases for determination of damages. They refused to consider the constitutional violation. Obviously, these are issues which would have to be fleshed out upon trial of the cause on its merits, but could not be done when a motion to dismiss is granted summarily. As here, when reviewing a dismissal on the pleadings, the material facts alleged by the losing party must be taken as true. *Hospital Building Company v. Trustees of Rex Hospital,* 96 S. Ct. 1848, 425 U.S. 738, 48 L. Ed. 2nd 338, appeal after remand 691 F2d 678. The

appellants do not deny the quote recited by the Trial Court from *Bailey v. Anderson,* 326 U.S. 203 at page 205 that:

> It has long been settled that due process does not require the condemnation of land to be in advance of its occupation by the condemning of authority, provided only that the owner have opportunity, in the course of the condemnation procedures, to be heard and to offer evidence as to the value of the land taken.

This is all well and good, however, in this instance, the plaintiffs were not granted such a right. Their claims for loss of their land and lack of due process went without any consideration whatsoever. They were summarily dismissed. Had they been accorded those rights and given a valid consideration, this suit would likely never have been filed. However, that has not been done in this instance. Their rights were denied them.

In the case of *Bailey v. Anderson,* supra, the complaining parties there were given a full opportunity to be heard and to introduce evidence which was then subject to **judicial review.** Neither of those opportunities was provided to the appellants herein. That is a critical difference in this action.

The Arkansas Law is clear that "the right of property is above and higher than any constitutional sanctions; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefore (Article 2 Sec. 22 of Arkansas Constitution.) Failure to provide means of restitution to private property without due process of the law is violative of both U.S. and Arkansas Constitution. *Robinson v. Arkansas State Game and Fish Commission,* 565 SW2d 433 (1978); *State v. McElroy* 595 SW2d 659 (1980).

The Arkansas Supreme Court has recognized the requirements of the State to follow the statutory provisions of the law. As noted in *State v. McElroy:*

> The prohibition of the taking, appropriation or damaging of private property without just compensation is binding on all branches of govern-

> ment. The judicial branch is no more vested with the power to take, appropriate or damage the property rights of individuals without compensation than is the executive branch.

Further, in *Arkansas State Highway Commission v. Alcot* ,__ Ark.__, 539 SW2d 432 (1976) of the Arkansas Supreme Court noted that eminent domain was the basis and method by which the State Highway Commission was to take property, and not by usurpation of individual rights as here. Appellants had rights that were clearly violated by the Arkansas Highway Commission and their property was taken. They have not been compensated or given any methodology or procedure by which they might be compensated.

The 8th Circuit Court of Appeals, following the ruling of the Federal District Judge, has determined that the action brought in this incidence is without proper authority based upon governmental immunity. This fails to note, however, the exceptions thereto adjudicated by the Arkansas Supreme Court which provides that a governmental entity cannot avoid the provisions of Arkansas Constitution Article 2, 22, which provides that:

> The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use without just compensation therefor.

The Supreme Court of Arkansas in *Robinson v. City of Ashdown,* 301 Ark. 226, 783 SW2d 53 (1990) determined that where a governmental entity acts in a manner substantially diminishing the value of land of a private land owner, and the government's actions are shown to be intentional, then it cannot escape liability to compensate for the taking of the property on the basis of its tort immunity. The Court there also noted with approval, 2 ALR 2d 677 (1948) which discussed the various circumstances where negligence based acts constituted governmental inverse condemnation.

In the present instance, Jewell and Gladys Kissinger, individuals residing in the City of Jonesboro, Craighead County, Arkansas, had their property taken from them by the Arkansas Highway Commission which, is an arm of the governmental hiarchy within the State.

The action obviously was intentional by the Commission. As was recited in the complaint originally filed herein, the defendant took the property in "a total invalid, illegal and unlawful taking contrary to the instructions of the plaintiffs and over their objections without any lawful authority whatsoever." (Appendix, Exhibit E) Here, as noted in that case, the Highway Commission knew that an invasion of the appellants' interest in the use and enjoyment of the property was certain to result from the Highway Commission's conduct, since they took the land, and then damaged a portion of appellants' other land. Therefore, in such instances the governmental immunity is not applied, since it was obviously an intentional action. *(Robinson v. City of Ashdown,* pages 231232) Also, see Restatement of Torts 2d, 825(b) comment(d).

Further, in *Robinson v. Beaumont,* 91 Ark. 477, 725 SW2d 839 (1987), the Arkansas Supreme Court noted that the Arkansas Courts would hold as the Federal Courts have done, since our procedural rules were patterned after the federal rules that qualified immunity would not apply, and the entity would not be shielded by governmental immunity where, as in this instance, the action taken was obviously one where an official knew or should have known that the action would violate the constitutional rights of the complaining party or where action was taken with malicious intention of deprivation of constitutional rights or other injury. See *Harlow v. Fitzgerald,* 457 U. S. 800 (1982).

Further, the Arkansas Courts have noted that even where governmental immunity is granted by statute, as in Arkansas Statutes Annotated, 12-12-502 thru 12-12-516, where an *official, person* or *institution* participates in an action which might be asserted as exempt due to qualified immunity, the case can only be one of qualified immunity upon a showing of good faith on the part of the official or entity involved. See *Jaggers v. Zolliecoffer,* 290 Ark. 250, 718 SW2d 441 (1986). In the present instance, the Federal District Court gave no consideration to that issue whatsoever, but summarily dismissed the action upon the motion to dismiss. The action was not pursuant to the motion for summary judgment which would require a meeting of proof with proof, but only based upon the pleadings. The burden of proving a qualified immunity is upon the entity asserting same. See *Jaggers v. Zolliecoffer,* supra. The 8th Circuit Court of Appeals summarily dismissed without any consid-

eration of the required proof by the respondent, Arkansas State Highway Commission. This was improper application of the doctrine of governmental immunity, and this Court should grant certiorari so that these very serious, guaranteed constitutional rights can be preserved. Such cases of inverse condemnation and lack of due process have serious consequential value for the individual citizens of this Nation. The summary taking of one's property by any government without due process should be fully and properly addressed and certiorari granted. Proper stands should be set. Therefore, this case is properly before this Court and should be so addressed and certiorari granted. A very significant federal question is before the Court on the individual rights granted by the U. S. Constitution.

Respectfully submitted,

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